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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1044

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellants,

—v.—

ROBERT D. MURGIA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR LEGAL SERVICES FOR THE ELDERLY POOR, AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL COUNCIL OF SENIOR CITIZENS AND THE MASSACHUSETTS CIVIL LIBERTIES UNION, AS *AMICI CURIAE*

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Statement of Interest

Legal Services for the Elderly Poor is funded by Community Action for Legal Services and the U.S. Department of Health, Education and Welfare to provide assist-

ance on research and litigation to lawyers dealing with the problems of the elderly. Legal Services for the Elderly Poor is particularly concerned with discrimination in employment against older persons, which is almost universal in the United States, and which denies approximately 10 per cent of this country's population the opportunity to earn a living and to contribute to society by continuing to work.

Legal Services for the Elderly Poor has participated as co-counsel or *amicus* in numerous cases before this Court involving the elderly including *Graham* v. *Richardson,* 403 U.S. 365 (1971), *Allied Chemical Workers* v. *Pittsburgh Plate Glass,* 404 U.S. 107 (1971), and *Ortwein* v. *Schwab,* 410 U.S. 656, *reh. den.,* 411 U.S. 922 (1973).

The American Civil Liberties Union is a private non-partisan organization of 250,000 members, engaged exclusively in the defense of the Bill of Rights. During its 55 years of existence, the Union has regularly advanced arguments to this Court under the Equal Protection Clause of the Fourteenth Amendment on behalf of a variety of groups and individuals who have suffered discriminatory treatment at the hands of state or local governments. In this brief, we argue on behalf of the elderly that mandatory retirement is a violation of equal protection, pursuant to the policy of the American Civil Liberties Union that "The test for employment should be the ability of the individual to perform the particular job function."

The National Council of Senior Citizens is the largest organization composed of senior citizens clubs in the United States. Incorporated as a non-profit organization in the

District of Columbia, it consists of more than 3,000 clubs with a membership of more than three million older persons. A majority of the members are retired and membership in the near future will come mainly from the ranks of older workers, many of whom will be affected by mandatory retirement provisions applicable to Federal, state or local government employment. Other members and prospective members face mandatory retirement in their nongovernmental jobs. Although they will not be affected directly by the outcome of this litigation, this Court's decision may well influence the future course of requirements for retirement at a fixed chronological age in all types of employment.

All parties have consented to the filing of this *amicus* brief.

The consent letter is annexed.

Summary of Argument

Mandatory retirement excludes by illegal classification of people past a certain chronological age. This irrational exclusion violates equal protection by preventing the normal, appropriate, individual determination on the merits of job capabilities and performance. In particular this brief demonstrates in detail that all the scientific evidence militates against this unconstitutionally irrational exclusion and blanket presumption.

I.

Introduction.

> To be seventy years young is sometimes more cheerful and hopeful than to be forty years old.
>
> —*Oliver Wendell Holmes*

The following sections deal with two prime constitutional infirmities of mandatory retirement: equal protection and due process. But these two infirmities are actually more powerful in combination. Both are part of the Bill of Rights and establish the rights of the individual in our democratic society. Together they assert a fundamental democratic principle: each individual has a right to be judged and treated on the basis of his individual merit. Equal protection prevents any classification which would limit this individual right. Due process guarantees that procedures exist to make sure the characteristics that justify different treatment really pertain to the individual. In this case, the classification (by mandatory retirement) to exclude from the protection by due process violates this fundamental principle. In this connection, it should also be noted that this classification to exclude with neither reason nor procedure also invades the First Amendment rights of association and freedom: not only the freedom to work, but also freedom of association with fellow workers and individuals similarly situated, and also the freedom to communicate ideas made possible by the status and income that comes from the pursuit of one's chosen occupation (for which one is still qualified).

Application of constitutional doctrine in this case leads to the conclusion that mandatory retirement at age 50—or at any age—is a classification that violates the equal protection clause of the Fourteenth Amendment. That conclusion is inevitable under both the strict scrutiny test and the rational relationship test of the equal protection clause.

In order to justify application of the more demanding strict scrutiny test, the Court must conclude, of course, that age is a suspect classification or that employment is a fundamental right. We believe that both conditions are met in this case. We also assert in Point IV, *infra,* that age-based retirement violates the due process clause of the Fourteenth Amendment because, among other things, it embodies a constitutionally offensive irrebutable presumption and no specific rational determination.

II.

Age-based mandatory retirement violates the equal protection clause.

A. *Employment Is a Fundamental Right*

Many of this Court's decisions have emphasized the fundamental importance of employment. Mr. Justice Bradley, concurring in *Butchers Union Slaughterhouse & Live-Stock Trading Co.* v. *Crescent City Live-Stock Landing & Slaughterhouse Co.,* 111 U.S. 746, 762 (1884), wrote:

> . . . The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the

> Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life; liberty and the *pursuit of happiness*.' This right is a large ingredient in the civil liberty of the citizen.

In *Truax* v. *Raich,* 239 U.S. 33, 41 (1915), the Court spoke of "the right to work for a living in the common occupations of the community" as being "of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." Accord, *Roe* v. *Wade,* 410 U.S. 113, 169 (1973) (Stewart, J. concurring). And in *Board of Regents* v. *Roth,* 408 U.S. 564, 572 (1972), this Court, citing *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1928), described the Fourteenth Amendment's guarantee of liberty as including "the right of the individual to . . . engage in any of the common occupations of life . . .".

Last year, this Court reaffirmed that public employment rights are entitled to a high degree of constitutional protection. In *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), six members of the Court stated that a non-probationary federal employee could not be discharged without the constitutional protections of procedural due process. And in *Perry* v. *Sindermann,* 408 U.S. 593 (1973), this Court held that if a state college teacher could prove that the college had a *de facto* tenure policy under which he would be considered to be tenured, the college could not discharge him without affording him the procedural protection of constitutional due process.

In this Court's working out the constitutional standards —at one time substantive, today procedural in most instances—applicable to public employees, a fundamental premise has persisted throughout its work. Seldom articulated because so basic, that premise has been—and is—that employment is a crucial facet of existence in America. For example, in *Smith* v. *Texas,* 233 U.S. 630 (1914), a railroad engineer was found guilty of violating a state law prohibiting any person from acting as a freight train conductor without having previously served for two years as a conductor or brakeman. There was no dispute that Smith was indeed competent to perform such duties.

Dwelling upon "the necessity of the fixing of arbitrary tests by which competent persons would be excluded from lawful employment," 233 U.S. at 637, the Court rejected "the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor . . .". *Id.* at 638. The Court reasoned (*Id.*):

> None of the cases sustains the proposition that under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.

The law at issue permitted, with minor exceptions, only freight train brakemen to rise to the position of conductor, while excluding everyone else. The statute did "not require

the brakeman to prove his fitness, though it . . . [did] prevent all others from showing that they . . . [were] competent." *Id.* Thus, the statute "absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor . . .". *Id.* at 639. And so the Court reversed, concluding: "[A]ll men are entitled to the equal protection of law in their right to work for the support of themselves and their families." *Id.* at 641. In reaching that conclusion, the Court was clear about the fundamental nature of access to employment (*Id.* at 636):

> Insofar as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords to those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.

Forty years later, this Court said in *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952):

> We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

See also, *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 238-239 (1957); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 605-606 (1967): "[T]he theory that public em-

ployment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."; *Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974).

Mandatory retirement policies established by government are, of course, obvious bars to employment. Very simply, they establish a group of persons who are rendered ineligible for retention, and for hiring. As such, they violate the Equal Protection Clause of the Fourteenth Amendment.

B. *"Old Age" Is a Suspect Classification*

This Court has never ruled on the question whether classifications based upon age are inherently suspect. But, through the years the Court has recognized certain classifications as suspect: race—*Loving* v. *Virginia,* 388 U.S. 1 (1967); national ancestry—*Takashashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948); alienage—*Graham* v. *Richardson,* 403 U.S. 365 (1971). Classifications based upon sex are also fast becoming recognized as suspect. In *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), four Justices held that sex was a suspect classification.

> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .' *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 175, 31 L Ed 2d

> 768, 92 S Ct 1400 (1972). . . . As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. 411 U.S. at 686-87.

Age, like sex, race and national origin, is also an immutable characteristic determined solely by the accident of birth. As the studies of work performance, and the historical accomplishments of those in their seventies (Appendix A), indicate the actual capabilities of those forced to retire are ignored by mandatory retirement statutes. It is as true for age as it has been for all classifications found suspect by this Court, that individual differences are far more significant than group characteristics, and that the imposition of disabilities on the basis of a group characteristic is abhorrent to individual responsibility.

Hernandez v. *Texas,* 347 U.S. 475, 478 (1954), holds that "when the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated." This guarantee of equal protection refers to the explicit language of the Fourteenth Amendment.

> The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. *It may not say that all men beyond a certain age shall be alone thus subjected,* or all men possessed of a certain wealth. These are distinctions which do not

> furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. *Gulf, C. and S.F.R. Co.* v. *Ellis,* 165 U.S. 150, 155 (1897). [Emphasis added.]

To the same effect, see *Mollere* v. *Southeastern Louisiana College,* 304 F. Supp. 826 (E.D. La. 1969), where discrimination against females under the age of twenty-one was found to be irrational and therefore unconstitutional.

In *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 28 (1973), this Court defined as a suspect class those who are "saddled with such disabilities, subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Are older people "subjected to . . . a history of purposeful unequal treatment . . . ."? Clearly yes. That history is perhaps not a long one: in the 19th century and before, few people attained 65 years of age, and those who did were productive members of society. See Section IV, *infra.* But the history of the 20th century is one of increasing prejudice and prejudicial treatment, exemplified by the expansion of mandatory retirement policies and statutes. Presumably, it might be suggested that one must wait for 300 years of discrimination, such as Blacks have experienced, before the "history of purposeful unequal treatment" rises to constitutional significance. To offer the thought, however, is to reject it.

Discrimination in employment on the basis of age pervades American industry. See Point IV(A), *infra*. In recognition of this fact, Congress passed the Old Age Discrimination Act of 1967, 29 U.S.C.A. §§621-634. Where the "Congressional statement of findings and purpose," 28 U.S.C.A. §621, goes far to identify the seriousness of the class disability, the substantive sections offer only partial remedies, and this only to those under 65, the less severely burdened portion of the older population. Discrimination continues to plague older Americans, and government on all levels continues to sustain it by mandatory retirement policies, excluding qualified people solely on the basis of age.

C. *No Compelling Interest Justifies Mandatory Retirement*

Given the fundamental right at stake, as well as the suspect nature of the classification, mandatory retirement can only be justified by a compelling governmental interest. *Dunn* v. *Blumstein,* 405 U.S. 330, 343 (1972).

The most common justification offered in support of mandatory retirement practices, and the justification offered in this case, is the claimed inability of older workers to satisfy the "physical and psychological demands of the job" (App. Br. 12). Obviously the state is justified in requiring that its employees be capable of performing their jobs, but the state must be able to show this Court that such an interest is served by its policy of mandatory retirement. In fact, scientific studies do not support appellant's policy. To the contrary, as we show in Point V, *infra,* the studies establish just the opposite—that older workers perform as well or better than their younger

counterparts. Therefore, while the state has the required interest in ensuring the productivity and capability of its employees, in this case the state has failed in its proof, for it has done barely more than assert that state police officers over the age of fifty cannot satisfactorily do their job.

D. *The Suggested Newer Standard of Equal Protection Analysis, Applied to Mandatory Retirement, Requires the Conclusion That the Practice Is Unconstitutional*

In *Reed* v. *Reed,* 404 U.S. 71 (1971), this Court, quoting from *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1908), enunciated what has come to be regarded by some courts and commentators as a more stringent standard of equal protection review than the so-called mere rationality test. The Court said that "classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, . . . '." (Citation omitted.) 404 U.S. at 76.

Brenden v. *Independent School District 742,* 477 F.2d 1202 (8th Cir. 1973) is illustrative of the thrust of the scrutiny invited by *Reed,* as well as instructive in examining the constitutionality of mandatory retirement. The *Brenden* court affirmed an injunction barring enforcement of a high school rule which precluded females from participating with males in high school interscholastic activities. In reaching that result, the court reasoned:

> [T]he underlying purpose of the High School league's rule is, as we have indicated, to insure that persons with similar qualifications will compete with each other. Yet, females, whatever their qualifications, have been barred from competition with males on the basis

> of an assumption about the qualifications of women as a class. The failure to provide the plaintiffs with an individualized determination of their own ability to qualify for positions on these teams is, under *Reed,* violative of the Equal Protection Clause. . . . 477 F.2d at 1302

Obviously, "individualized determination" is exactly what mandatory policies preclude.

Under *Reed,* there must be a fair and substantial relation between the classification made and the object of the legislation. Does that relation exist for compulsory retirement laws? Again, whether the object is job performance, removal of "deadwood," fluidity in the job structure, avoidance of decision making, or economic efficiency, the answer must be in the negative. If any lesson emerges from the study of mandatory retirement, it is that there simply is no correlation between age and ability. Given that glaring absence, arguments couched in terms of job performance—the only argument urged by appellants—simply collapse.

E. *Even Under the Mere Rationality Tests, Mandatory Retirement Must Fail*

It is of course mere intellectual exercise to talk of mandatory retirement's constitutionality in terms of its only needing some rational basis to sustain it. The right at issue, access to employment, and the classification made militate against this least stringent constitutional standard applying. Yet even were it deemed to apply, mandatory retirement would have to fail.

Even if one were to assume that age is a relevant factor for classification, and that age 50 in particular bears some

rational relationship to work capacity, the statute in question in this case would still be unconstitutional. It has been held in many courts that in spite of general presumptions of general physical probabilities, no matter how weighty, individuals nonetheless may not be excluded, particularly from employment, unless it has been shown that the general characteristic applies *to that individual* excluded for that general reason. See, for example, *Weeks* v. *So. Bell Tel. and Tel. Co.,* 408 F.2d 228 (5th Cir. 1969).

In this connection, *Bowe* v. *Colgate Palmolive Co.,* 416 F.2d 711, 718 (7th Cir. 1969) is instructive. In that case, the company refused to let women have jobs which required lifting weights of more than thirty-five pounds because of claims of biological inadequacy. The Court struck down this policy of the company, and held that "all workers . . . [must] be afforded a reasonable opportunity to demonstrate his or her ability to perform more strenuous jobs on a regular basis." See also, *Cheatwood* v. *So. Central Bell Tel. & Tel. Co.,* 303 F. Supp, 754 (M.D. Ala. 1969); *Rosenfeld* v. *Southern Pacific Co.,* 293 F. Supp. 1219 (C.D. Calif. 1968). We demonstrate in the following sections of the brief that scientific and scholarly studies prove that there is *no* basis whatever for the state to assume that all persons at a given age—or all state police officers at age 50—become incapable on the day of their "critical" birthday of performing their work as well as it was performed the previous day.

The proof which we set out in the next section so strongly supports the proposition that a particular arbitrarily chosen age is never universally—or even often—related to job performance, that the legislative classification in this case cannot even satisfy the lenient rational-relation-

ship test of the equal protection clause. See *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971); *Weeks* v. *So. Bell Tel. and Tel. Co., supra; Bowe* v. *Colgate Palmolive Co., supra.* Nor, needless to say, does the classification satisfy the middle-ground test enunciated in *Reed* v. *Reed, supra.*

III.

Age-based mandatory retirement violates the due process clause.

A. *Age-Based Mandatory Retirement Embodies a Constitutionally Offensive Irrebutable Presumption*

In *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974), the Court struck down school board policies requiring the termination of service of pregnant schoolteachers. In doing so, the Court relied on the independent ground that the policies constituted constitutionally offensive irrebutable presumptions:

> [T]he provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job. The rules contain an irrebutable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary. 414 U.S. at 644.

This language could almost be literally transposed to the case of a mandatory retiree. An irrebutable presumption is erected that at age 65—or 60, or as here, age 50—physical and/or mental ability declines—without any individualized assessment at all of the employee's actual abilities or competence.

The *LaFleur* Court, assuming *arguendo* that some pregnant women *are* physically unable to work, went on to reason that "it is evident that there are large numbers of teachers who are fully capable of continuing work for longer than" the regulations in question permitted. 414 U.S. at 646. Thus, the Court concluded:

> [T]he conclusive presumption embodied in these rules, . . . is 'neither necessarily [nor] (sic) universally true,' [citing *Vlandis* v. *Kline,* 412 U.S. 441 (1973)] and is violative of the Due Process Clause. *Id.*

Virtually every scientific study, as well as simple knowledge of people, confirms that people do differ—that the man who is chronologically 40 years old can be physically and mentally 60 years old, and that the 70 year old can in turn be physically and mentally 25. See Section V, *infra.* There simply is no inflexible truth, universal and necessary, that all 50 year olds are equal as compared to each other, or unequal as compared to their younger fellows.

LaFleur, while the strongest and clearest articulation by this Court of Constitutional abhorrence of irrebutable presumptions which deny individualized assessment of people, is no aberration. In *Vlandis* v. *Kline,* 412 U.S. 441 (1973), this Court declared unconstitutional (as violative of the due process clause) a Connecticut statute mandating the

irrebutable presumption of college students' non-residency. Because "permanent irrebutable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments," 412 U.S. at 446, this Court struck down the statute before it, rejecting such presumptions when they are "not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." *Id.* at 452.

Similar reasoning was employed in *Stanley* v. *Illinois*, 405 U.S. 645 (1972), where the Court addressed an Illinois law providing that, while a child could be taken away from its parents by the state only after notice, a hearing, and proof of parental unfitness, unwed fathers were conclusively presumed to be unfit and therefore were not accorded these due process protections. Rejecting this scheme, the Court said:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. 405 U.S. at 656-57.

Obviously, these decisions—particularly *LaFleur*—are directly apposite in assessing the constitutionality of mandatory retirement laws.

B. *Age-Based Mandatory Retirement Violates the Due Process Clause, Even Short of Applying the Irrebutable Presumption Doctrine*

In *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957), the Court set a minimum requirement for exclusion of persons from government (or government-regulated) employment.

> A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the due process or equal protection clause of the fourteenth amendment. . . . A state can require high standards of qualification, . . . but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . ." 353 U.S. at 238-39.

Unless a hearing is provided, that rational connection cannot be established, nor its assertion controverted. Typically—and indeed in the case of the appellee—no hearing is provided. The employee is automatically ousted upon attaining the critical age. Obviously, no procedural protections are provided—a defect of constitutional proportions. Cf. *Arnett* v. *Kennedy, supra,* holding that a tenured public employee could not be terminated without procedural due process. As Mr. Justice Powell there stated in an opinion in which Mr. Justice Blackman joined, the two concurring in part and concurring in the result in part:

> While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. 416 U.S. at 167.

See, also, opinion of Mr. Justice White, *Id.* at 171-203, opinion of Mr. Justice Marshall (joined by Justices Douglas and Brennan), *Id.* at 206-31.

IV.

The facts of age and employment.

A. *The History of Mandatory Retirement*

The proportion of people over age 65 in America remained quite small until the twentieth century; in 1900 only 4% of the population was 65 or older.[1] These people continued to participate in the work life of the community. In 1890, 68.2% of men 65 and older were active members of the work force.[2] Three decades later, a majority of all men 65 and over remained in the work force.[3]

The twentieth century has witnessed fundamental changes in both the proportion and utilization of older people. Persons 65 and older now total more than twenty million; by the year 2000 they will probably number 29 million.[4] The advances in health and nutrition which have made this increase possible suggest that the capabilities of the older population have improved. One would expect a more active and productive older population now than fifty years ago, yet one finds a dramatic decrease in work participation. Only 25% of males 65 and older were active in

[1] U.S. Bureau of the Census, *Abstract of the 12th Census* 11 (1904).

[2] G. Mathiasen (ed.), *Criteria for Retirement* 13 (1953).

[3] *Id.*

[4] U.S. Dept. of Commerce, *U.S. Statistical Abstract 1974* 6 (1974).

the work force in 1970.[5] For all persons of this age, the figure is a meager 3.4%.[6] How does one account for this development?

During the twentieth century, the practice of mandatory retirement, began to grow in our society. A United States Department of Labor survey of 8.8 million male workers reported:

> Of the 8.8 million employed males in 1969, one-third faced compulsory retirement at 65 years of age, generally considered the usual retirement age in many private pension plans, the Social Security Act and the ADEA, less than 2 percent were subject to plans which provided for compulsory retirement under private employer pension plans before reaching the age of 65, and 12 percent will be required to retire at age 66 or older, ...[7]

In terms of numbers, the males surveyed who were subject to compulsory retirement totalled 4.2 million.[8] Another government study, of 224,000 women retirees, established that 34 percent of those aged 65 and over who left their jobs did so because of a mandatory retirement requirement.[9] A more recent survey reports that "61 percent

[5] B. Smith, *Aging in America* 19 (1973).

[6] U.S. Department of Labor, *Age Discrimination in Employment Act of 1967* 43, Table I (1974).

[7] *Id.* at 18-19.

[8] The report cautioned that "the figures on compulsory retirement may understate the proportion of workers subject to such provisions." *Id.* at 20, n. 1.

[9] Reno, "Women Newly Entitled to Retired-Worker Benefits: Survey of New Beneficiaries," V. 36, No. 4, Social Security Bulletin 3 (April 1973).

of all working people can expect that at a fixed age they will be told to retire from their jobs."[10] Yet mandatory retirement is not supported by popular opinion in this country.[11]

Nutured on myths and misconceptions,[12] compulsory retirement serves only to abuse the guarantees of due process and equal protection.

> Mandatory retirement policies as they are presently operated apply an arbitrary standard to all employees who reach a stated age limit. The inexorable passage of time is deemed prima facie evidence of incompetence —yet the weight of economic data collected by both public and private sources indicate that such facile distinctions are not justified. This arbitrary standard coupled with the adverse consequences of retirement and the inability of the elderly worker to find substitute employment make retirement based solely on age violative of the due process and equal protection clauses of the Constitution.

Note, "Too Old To Work: The Constitutionality of Mandatory Retirement Plans," 44 So. CAL. L. REV. 150, 179 (1971).[13]

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[10] Louis Harris and Associates, Inc., *The Myth and Reality of Aging in America* 211 (1975) (hereinafter *Harris Survey*).

[11] *86%* of the population believed "nobody should be forced to retire because of age, if he wants to continue working and is still able to do a good job." *Id.*

[12] See, e.g., Withers, "Some Irrational Beliefs about Retirement in the United States," *Industrial Gerontology* 23 (Winter, 1974).

[13] See, in general, *Age Discrimination and the Over-Sixty-Five Worker*, 3 Cumberland-Samford L. Rev. 333 (1966); *Age Discrimination in Employment: Correcting a Constitutionality In-*

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B. *Mandatory Retirement Causes Economic, Physical and Emotional Harm to Retirees*

Our culture places work at the center of social life. It is a crucial source of personal definition, and a primary determinant of social status. It provides the routine structure for daily activity. The work place provides a primary source of meaningful social contacts. The ability to earn money is basic to a sense of autonomy. All of these bases of personality (autonomy, self-worth, interpersonal relationships) face disintegration with the loss of work through mandatory retirement.[14] The Committee on Aging of the American Medical Association has reported on the psychological and somatic consequences of mandatory retirement, concluding that enforced idleness undermines health.[15] Un-

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firm Legislative Judgment, 47 So. Cal. L. Rev. 1311 (1974); *Age Discrimination in Employment: The Problem of the Older Worker*, 41 N.Y.U. L. Rev. 383 (1966); *Mandatory Retirement: A Vehicle for Age Discrimination*, 51 Chi.-Kent L. Rev. 116 (1974).

[14] Mathiasen, *supra* at 66.

[15] . . . [At] a certain chronological age—most often 65— . . . outside forces outside of medicine inflict a disease—or disability-producing condition upon working men and women that is no less devastating than cancer, tuberculosis, or heart disease. This condition—enforced idleness—robs those affected of the will to live full well-rounded lives, deprives them of opportunities for compelling physical and mental activity, and encourages atrophy and decay. It robs the worker of his initiative and independence. . . .

There is ample clinical evidence that physical and emotional problems can be precipitated or exacerbated by denial of employment opportunities. Few physicians deny that a direct relationship exists between enforced idleness and poor health. . . .

The physical and mental health of an individual can be affected by loss of status, lack of meaningful activity, fear of becoming dependent, and by isolation. Compulsory retirement produces a chain reaction in the health of such persons. It is a fact that the working man finds it difficult to accept the feeling of no longer

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less a "productive, routinized and ego-satisfying substitute for employment" can be found, the person victimized by mandatory retirement faces a situation "as devastating to his self-image and social adjustment as would be [that of] a mandatory rule that he change sexes at a given age." [16]

These problems are compounded by the effects of poverty: "their low economic position also appears to increase dramatically their sense of loneliness and rejection by society . . . and heighten their feeling of isolation." [17] One-sixth of the elderly in this country live below the poverty line; many more live just above it.[18] Mandatory retire-

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being needed on the job. He loses contact with his work associates—many of whom may have been his closest friends—and is thrown back on the family. Here, having a lesser part to play, he may experience loss of dignity and status. This is particularly so if his contributions to the family social circle previously have revolved solely or primarily around a recounting of his job experiences. The individual who has developed virtually no interests outside of those connected with his paycheck, who does not keep up with community affairs or dress up as he did when working, who can offer little to the family circle except his presence underfoot for 24 hours a day, may soon find himself isolated from the family itself. While isolation, per se, does not cause illness, it increases the chances of physical or emotional disturbance. It may also activate underlying neuroses, contribute to obesity and alcoholism and even precipitate an underlying tendency to suicide. . . . *Committee on Aging, American Medical Association, Retirement—A Medical Philosophy & Approach* 1-3.

[16] B. Kutner, D. Fanshel, A. Togo, and T. Langer, *Five Hundred Over Sixty* 253 (1956).

[17] Harris Survey, *supra* at 131. See, generally, for the isolation of the elderly and poor worker, G. Rosenberg, *The Worker Grows Old* (1970).

[18] Special Committee on Aging, United States Senate, "Developments in Aging: 1974 and January-April 1975, 94th Cong., 1st Sess., 1975," at XVIII. "More than four million women in this

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ment plays a real role in this situation. The median incomes for men who left jobs with compulsory retirement provisions was $7,880, while their post-retirement median benefit income was only $3,380.[19]

If the retiree looks for other employment, he will very likely find that he is ineligible because of his age. He has become a valueless commodity on the job market.[20] The interaction of economic and psychological consequences of forced retirement can be disastrous to an individual victim.

The views of those 65 and over who are retired or unemployed, give full expression to these deprivations occasioned by mandatory retirement. Thus, in a recent survey, 74% reported that they missed the money the job brings in.[21] Seventy-three percent missed the people at work, while 62% missed the work itself. The feeling of being useful was missed by 59%; 57% missed "things happening around" them. The lack of respect of others was felt by 50%, and 43% missed have a fixed schedule every day.[22]

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country are old and alone and over half that number are also living their last years in poverty." Heidbrener, "Pensions and the Single Woman," *Industrial Gerontology* 52 (Fall 1972).

[19] Reno, "Compulsory Retirement Among Newly Entitled Workers: Survey of New Beneficiaries," v. 35, no. 3 Social Security Bulletin 1 at 10-12 (March 1972). See also, "Too Old to Work . . . ", *supra* at 152-55.

[20] Special Committee on Aging, United States Senate, "Employment Aspects of the Economics of Aging," at 10-11, 91st Cong., 1st Sess., 1969.

[21] *Harris Survey, supra* at 218.

[22] *Id.*

V.

The justifications offered for mandatory retirement rely upon myth and misconception.

A. *Chronological Age Is Not a Cause of Declining Job Performance*

The typical justification for age-based mandatory retirement is that older workers lack the physical capacity to perform the job.[23] Both the experience of law and the social sciences run counter to this justification. In Appendix A of this brief there is a partial list of accomplishments past the age of 69. These speak eloquently of the irrelevance of chronological age to productive capacity. The scientific studies confirm this fact on a more mundane level. There has never been a judicial finding that older workers perform less well than younger workers, nor could there be.[24] The relationship between aging and ability to perform a job as measured in actual employment situations has been the subject of relatively few studies.[25] A Depart-

[23] Secretary of Labor W. Willard Wirtz reported to the Congress, in 1965, that "[p]hysical capability is by far the most important single reason advanced for imposing upper age limits on employment." *The Older American Worker—Age Discrimination in Employment, Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964* 8 (1965).

[24] In *Hodgson* v. *Greyhound Lines Inc.*, 499 F.2d 859, 865 (7th Cir. 1974), the Court found that "statistical evidence establishes that Greyhound's safest driver is fifty-five years of age and has sixteen years of experience as a Greyhound driver." In finding that a policy not permitting the *hiring* of drivers over age thirty-five did not violate 29 U.S.C. §623, the court emphasized both the high degree of risk to others, 499 F.2d at 863, and the extraordinary stress inherent in the particular tasks assigned to new employees. 499 F.2d at 864-65.

[25] Bureau of Labor Statistics, Dept. of Labor, Bull. No. 1223, *Comparative Job Performance by Age: Large Plants in the Men's Footwear and Household Furniture Industries* (1957).

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ment of Labor study of office workers found that older workers perform as well as, and better than, younger employees.[26] Surveys of employers rating characteristics of older employees relative to younger employees found that older workers tend to be rated as equal or superior to those younger.[27] Those in positions to make hiring

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This study found a slight decrease in productivity among older workers.

Bureau of Labor Statistics, Dept. of Labor, Bull. No. 1273, *Comparative Job Performance by Age: Office Workers* (1960).

This study reported greater productivity by older workers.

Canadian Dept. of Labour, Economics and Research Branch, *Age Performance in Retail Trade* (1959).

This study found that older department store workers were equal to, or better than those younger, with peak performance at ages 51-55.

Clay, "A Study of Performance in Relation to Age at Two Printing Works" 11 Journal of Gerontology 417 (1956).

This researcher concluded that machine compositors and hand compositors showed a slight decline in productivity after age fifty, while older readers maintained a higher level of performance than younger ones until retirement.

Häkkinen, *Traffic Accidents and Driver Characteristics* (1958).

This study of Helsinki bus and tram drivers found no correlation between age and accidents.

Norman, "Professional Drivers and Road Safety" in *Proceedings of the Second Congress of the International Association for Accidents and Traffic Medicine* (1966).

This study of London bus drivers found the safest age range to be 60-64, with no significant decline for those older.

Palmer and Brownell, "Influence of Age on Employment Opportunities" 48 Monthly Labor Rev. 765 (1939).

These researchers found no correlation between age and output in surveying six New England companies.

Walker, "The Job Performance of Federal Mail Sorters by Age" 87 Monthly Labor Rev. 296 (1964).

This study of postal workers found a slight decrease, less than 10%, in performance after age 60.

[26] Dept. of Labor Bull. No. 1273, *Office Workers, supra.*

[27] Peterson, "Older Workers and Their Job Effectiveness" in *Gerontology* (C.B. Vedder, ed., 1963). This survey covered more than 3,000 older workers employed at 81 organizations.

decisions believe that older workers are capable of continued work.[28]

The results of these studies may not be conclusive, but they suggest that, if any age group characteristic is significantly related to job performance, then experience is the most significant variable in predicting worker effectiveness.[29] Despite the proved effectiveness of older workers and the absence of evidence of age-related incompetence, the myth that the physical capacity to perform a job necessarily declines with age persists.

Two clear errors underlie the belief in age-related job incapacity. The first is a misapplication of statistical data. Where individual differences within the two groups are greater than the average differences between those groups of younger and old persons, no general principle identified with the age of one group can be fairly applied.[30] Whatever biological changes occur as a result of aging vary greatly by individuals as to the *chronological* age at which these changes occur. Similarly, the degree to which these changes *affect* individuals varies, as do the individual's ability to compensate for them. The present state of health, the past health history and the life experience of the individual influence the biological effects of aging, if any, and what effect in production, if any, these physical changes produce. Chronological age indicates far less about an

[28] *Harris Survey, supra* at 213: 52% of those with responsibility for personnel decisions agreed with this statement—"Most older people continue to perform as well on the job as they did when they were younger."

[29] A. Heron and S. Chowan, *Ageing and the Semi-Skilled: A Survey in Manufacturing in Merryside, London* (1961).

[30] Schneider, "How Capable Are Older Workers?" in *The Older Worker* 33-50 (1962).

individual's potential performance than does any real test of functional capacity.

Confusing the effects of aging with the effects of diseases occurring among older people is the second error at the source of the stereotype. Ill health is a major cause for people leaving their jobs at all ages, young, middle aged, and old. Ill health always comes as an unexpected curse and can never be predicted on the basis of chronological age. A study of the careers of airline pilots indicates that the age of termination is related to the onset of medical problems, and *not* to advancing age.[31] The diseases popularly associated with old age, arteriosclerosis and senile dementia, are *not* consequences of normal aging.[32] The readiness with which people are willing to leave their job increases with their awareness of health problems, rather than as a direct function of increasing age.[33]

As a matter of law, disability has been determined on the basis of individual examination and review, and not on the basis of a general assumption. Just as exposure to hazardous conditions, or the occurrence of an industrial accident, are not sufficient to establish disability, the onset of advancing age should not be sufficient to presume ill health. Even if one could establish that older people are more prone to debilitating diseases than younger people, that still would not be a sufficient basis to discriminate

[31] McFarland, "Medical Fitness for Flying in Middle Aged Pilots," *Some Problems of Aviation and Space Medicine* 45-53 (1967). The court below, 376 F. Supp. at 756, found a similar pattern in considering the statistics kept on disability retirements from the Uniformed Branch—that there is no relation between approaching retirement age and incapacitating disability.

[32] Butler, "The Facade of Chronological Age," 119 Am. J. Psych. 721, 727-28 (1963).

[33] Jacobson, "Willingness to Retire in Relation to Job Strain," 13 Industrial Gerontology 65 (Spring 1972).

against healthy members of that class. To do so would allow discrimination whenever there existed a high correlation between an identifiable characteristic and ill health. Blacks are far more vulnerable than Whites to strokes and heart attacks.[34] Would that be a reasonable ground to exclude them from high risk employment as bus drivers, teamsters, airplane pilots or police? Cigarette smokers are more prone to a broad range of diseases than nonsmokers, but exclusion of all smokers from strenuous employment would be considered arbitrary and capricious. In the case of a cigarette smoker, the characteristic is voluntary and changeable. It is far more unfair to make an irrebuttable presumption concerning physical capacity on the basis of an immutable characteristic, such as race or age.

The National Institute of Mental Health (NIMH) has completed a long-term pilot study on aging in healthy older males.[35] The study used two groups of older persons (aged 65-91), one judged entirely healthy, or subject to trivial difficulties, after extensive medical examination, and the other characterized by more serious, though asymptomatic, illness, and a control group of younger persons.[36] The results of the study may be summarized as follows: there were "few significant age-specific differences in quantitative variables."[37] For example, in both pulmonary function and cerebral circulation metabolism, there were

[34] Among the population aged 45-64, the prevalence of heart disease for Blacks is more than twice that of Whites, while the prevalence of hypertension is approximately twice that of Whites. National Center for Health Statistics, U.S. Dept. of Health, Education and Welfare, *Health in the Later Years of Life* (1971) 18-19.

[35] J. Birren (and others, eds.), *Human Aging: A Biological and Behavioral Study* (1971) (hereinafter *Human Aging*).

[36] *Id.* at 13-14.

[37] *Id.* at 310.

no significant differences between the older healthy group and the younger group, while the less healthy group reported statistically significant impairment of those functions.[38]

The study did note differences in EEG patterns as a consequence of aging, but found no functional correlation to these changes.[39] The intellectual ability of the older group, as measured by the Wechsler Adult Intelligence Scale (WAIS), was superior to those of the younger group (in terms of verbal skills, while performance skills were slightly lower).[40] It has been found that there are no significant age differences in perceptual accuracy, though channel capacity is slightly below that of younger people.[41] Other studies support the conclusion that overall mental ability does not decline as a result of increasing age, but rather from cerebral vascular diseases and senile dementia.[42]

[38] *Id.*

[39] *Id.* at 312.

[40] *Id.*; see also, Bisdorfer, "The WAIS Performance of the Aged: A Retest Evaluation," in *Normal Aging* 208, 216 (E. Palmore ed. 1970).

[41] Christensen, "Interference in Memory as a Function of Age," XXIX *Dissertation Abstracts* 2216-B (1968).

[42] Birren, *Increment and Decrements in the Intellectual Status of the Aged*, Psychiatric Research Report 23, at 207, 213 (1968). Dr. Birren, who is Director of the Gerontology Center, University of Southern California, has recently summarized his research in the following manner:

> Because of my research background I have been involved in several policy discussions during my career about the use of chronological age as an index for retirement. This had involved a role as a consultant to the Federal Aviation Agency with regard to commercial airline pilots, the United States Army, and other groups. My own research has borne out the fact that given good health, there is little change in health, but not because of intrinsic processes that could be identified

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Normal aging does result in decreased speed in psychomotor function.[43] This refers less to automatic responses than to situations involving choice in perceptual, psychomotor or associative functions.[44] Novel and complex situations may present more difficulties, and require more time in which to respond, for older people. The quality of the response, though, is likely to be equal to, or better than, those of younger people.[45] Finally, these complex tasks are capable of being learned by older people to a point of equal quickness of response to those younger.[46]

The available data only partially validates the hypothesis that aging affects behavioral capacity. The process of aging in healthy individuals produces some measurable changes in biological functions. Even this narrow statement must be examined critically. Many functions remain unchanged by age, and only deteriorate from disease. Other changes, such as those measured by EEG, have *no* known effect on behavioral capacity. Some changes may

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with chronological age or aging. In particular, those areas of human capacities that depend upon the massing of experience, vocabulary, verbal comprehension, and reasoning show little direct dependence upon chronological age. Certain other processes do show a change with age, that is, those related to the speed of information processing, perception, and response. While certain skills may be influenced by the change in speed with age, they appear very remote from those qualities that would distinguish the experienced professional, the educator, or such activities as the writing of books. Memo from Dr. James E. Birren to Dr. James A. Peterson, January 26, 1971.

See also, n. 32.

[43] *Human Aging, supra,* at 313.

[44] Fozard, J. and Carr, G., "Age Differences and Psychological Estimates of Abilities and Skills," 13 Industrial Gerontology 75, 86 ff. (Spring, 1972).

[45] *Id.* at 94.

[46] *Id.*

be compensated for to retain a high level of capability; others may be statistically significant but of so small a degree as to be without practical effect. The methodology used, cross-sectional studies of groups of younger and older people, remains vulnerable to the historical differences in the experience of two different generations; only far more costly longitudinal studies can establish with certainty the effect of aging on culture-bound human capabilities.

Even if the functional effects of aging could be established with certainty, it would remain to be demonstrated that these effects are crucial to job performance. If an older worker has slower tested response time of a specific sort, yet is able to compensate for this on the job by greater foresight and concentration, job performance may be the same or even better than that of a younger employee.[47] Clearly any demonstrable diminution of ability must be actually demonstrated to affect total productivity as it may be either irrelevant (such as not being able to lift 50 pounds when the job never requires more than 25 be lifted), or compensated for (as is the case for bus drivers).

B. *The Rationale That Older Workers' Abilities Cannot Be Assessed, Thus Necessitating an Indiscriminate Rule Requiring Retirement, Is Without Merit*

Appellants, while acknowledging "that a mandatory retirement plan involves the inevitable loss of individual public employees who remain willing and able to work beyond the prescribed retirement age," App. Br. at 19,

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[47] The job of bus driver would seem to require many of the basic physical and psychological skills which have been shown to decline with age, such as reaction time and night vision. Yet, studies of bus drivers have revealed that older drivers are at least as safe, and sometimes safer, than younger drivers. See, *Hodgson* v. *Greyhound Lines, Inc., supra,* n. 24, and Norman, *supra,* n. 25.

maintain that "substituting individual determinations of fitness for an across-the-board approach would carry with it enormous difficulties which defy judicial adjustment." App. Br. at 20.

> Essentially, state and federal legislatures have chosen to avoid the depressing and demeaning task of determining, on a case-by-case basis, when an individual has reached an elusive point of diminished productivity. The use of a single line avoids the psychological destruction inherent in an individualized judgment process and provides a sense of certainty to one's career in public service. App. Br. at 20.

People are hired; people are promoted; people are demoted; people are fired. All these acts require the judgments of employers and may cause pain to some or many workers. Why is the firing on the excuse of chronological age in any way a different situation?

Perhaps the feelings of a few who are fired at the particular arbitrary age who ought to be fired on merit appreciate being protected (for the first time in their life) from such critical judgment, for the few who might prefer being told they are too old rather than being confronted with the claim that they are incompetent, there are opposed the many others who properly object that they don't want to be fired because they are too "old" and therefore presumed worthless.[48]

Large firms employing more than 500 people are far more likely to use mandatory retirement policies than small firms employing less than 100 people.[49] The personnel

[48] See *Harris Survey, supra,* at 211, cited, *supra,* n. 11.

[49] F. Slavick, *Compulsory and Flexible Retirement in the American Economy* 36 (1966).

practices of larger firms are far more impersonal and bureaucratic than those of smaller firms. If mandatory retirement were a rational means to reduce the "psychological destruction" of determinations of incompetence, it would be far better suited to the closer contacts of the smaller firm. As the actual practice of organizations is exactly opposite, it seems unlikely that mandatory retirement is a rational means to aid either employers or employees in the decision to terminate employment.

Appellant's first argument, that individual determinations of functional ability (and its occasional relationship to chronological age) cannot be made, must be considered in the light of the available scientific evidence.

Two methods for testing functional job capacity have been used in this country. The Hanman method[50] and the GULHEMP method.[51] Both methods begin with the concept of relating task analysis to medical testing. The potential employee is tested to determine his physical capabilities; the job for which he is being considered is analyzed to determine its physical requirements. The capabilities are matched against requirements to determine job eligibility.

[50] American Mutual Liability Insurance Company, *Physical Abilities to Fit the Job: How to Determine a Worker's Physical Abilities and Relate Them to Job Demands, Safety and Productivity* (1968).

Hanman, "The Evaluation of Physical Ability," 258 New England Journal of Medicine 986 (1958).

L. Koyl and P. Hanson, *Physical Ability and Work Potential* (1969).

McFarland and O'Doherty, "Work and Occupational Skills," in *Handbook of Aging and the Individual* (J. Birren, ed.) 459-466 (4th ed. 1967).

[51] Batten, "Application of a Unique Industrial Health System," Industrial Gerontology 38 (Fall 1973).

L. Koyl, *Employing the Older Worker* (1973).

Koyl and Hanson, *supra.*

The Hanman method records the physical and environmental requirements of jobs and the physical abilities of potential employees in units of time for eighty specific factors.[52] A physician evaluates the employee, and an in-

[52] McFarland and O'Doherty, *supra*.

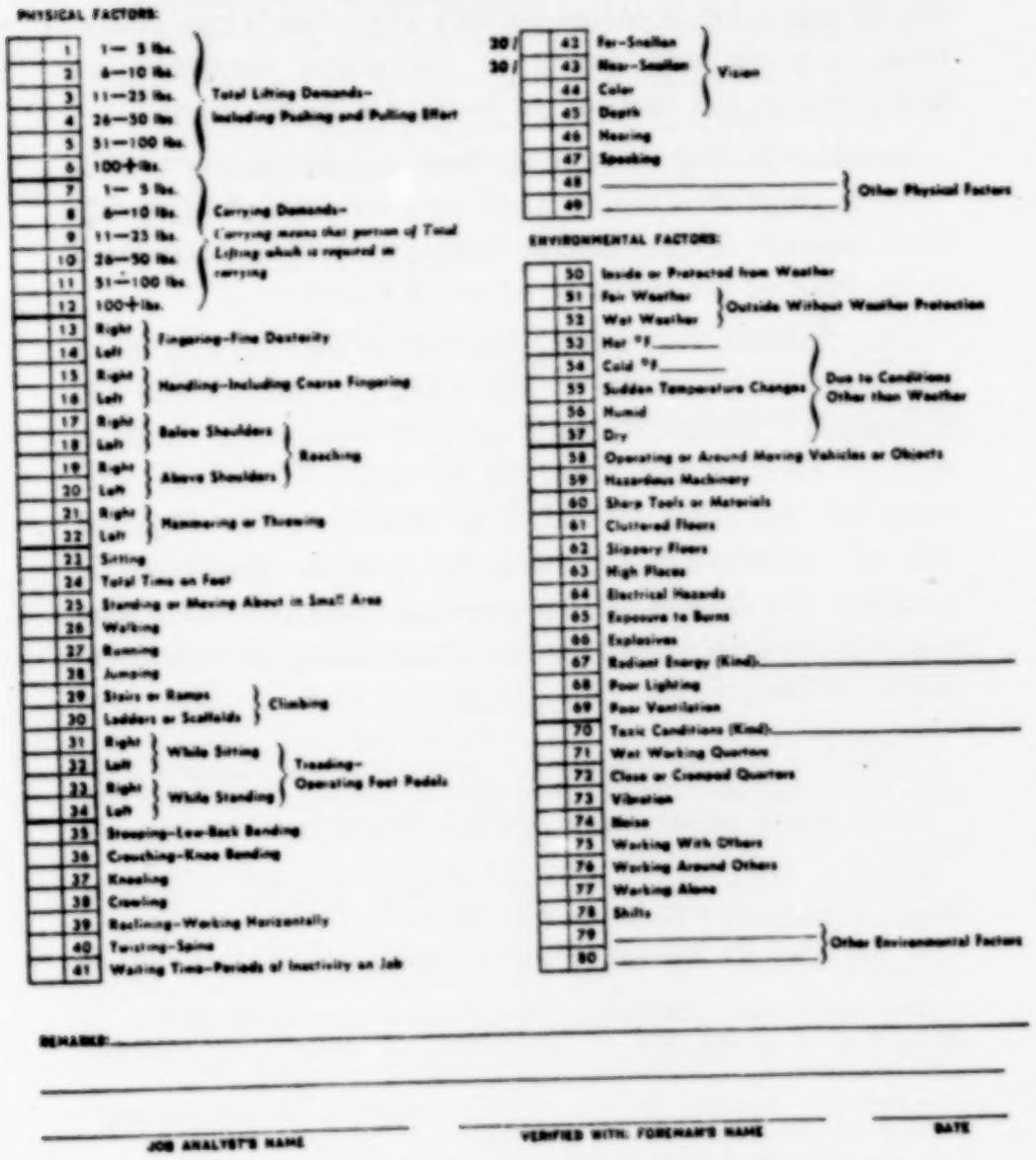

FIG. 5.—Chart showing Profile of Physical Demands. (From Hanman, 1958.)

dustrial engineer, the demands of the job. The comparison of the Profile of Physical Abilities with the Profile of Physical Demands, along with interviewing and other traditional personnel techniques, is then used to place the worker. Modifications of this technique include shortening the number of factors evaluated, and including mental and emotional factors in the evaluation.

The GULHEMP method tests seven variables, General physical condition, Upper extremities, Lower extremities, Hearing, Eyesight, Mentality and Personality, and rates the results on a 1-7 scale, with one being perfect function and seven being total incapacity. The jobs within an organization are analyzed to determine minimum ratings for each of the above variables. After an applicant is tested, the result chart is matched against the requirement chart to determine physical capability for the job.[53]

[53] Batten, *supra* at 47.

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FIGURE 2

Worker X — — — — — Job Requirements

OTE: Matchings of workers' abilities to job requirements are rarely isomorphic. As ng as capacity does not exceed requirements too greatly, effective performance may expected.

GULHEMP was developed for a period of 16 years at the deHavilland Aircraft Plant in Canada. It has been tested on a broad scale in Portland, Maine, by the Maine Employment Service.[54] The results may be summarized as follows:

> —testing and use of the five physical variables was more precise and reliable than mental and personality variables.[55]
>
> —80.7% of workers 55 and over were found to have physical capabilities compatible with job requirements; 63% were employed.[56]
>
> —those employed by GULHEMP testing used significantly less sick leave than those employed prior to the use of the method, indicating a greater harmony between capacity and requirements than through use of traditional personnel practices (among them chronological age discrimination).[57]

The demonstrated worth of GULHEMP validates the concept of matching individual capacity to job requirements. Social science research continues to refine its capability to measure accurately both the physical indicators

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[54] Quirk and Skinner, "IHCS: Physical Capacity, Age and Employment," Industrial Gerontology 49 (Fall 1973).

[55] In the case of retaining, rather than hiring of new employees, these tests should be less crucial. Furthermore, these variables are more easily tested in relation to specific job situations rather than for a general population as in the Maine experiment.

[56] Quirk and Skinner, *supra* at 60, 61.

[57] .36% v. 4.29% of work time on sick leave. Levine, "IHCS: Benefits & Costs to Industry," Industrial Gerontology 63, 65 (Fall 1973).

of biological function and the physical requirements of job tasks.[58]

Task analysis has been a continual interest of industrial engineers and personnel managers in the pursuit of greater job efficiency.[59] Although they may not be translated into terms of underlying biological functions, all jobs listed in the D.O.T. have been analyzed in terms of basic functional requirements, and most organizations have specific functional criteria for job positions.[60]

The stereotypes concerning the performance of older workers have no scientific validity. The means exist to make accurate determinations of worker capability at any age. What rational justification can there be for an incorrect presumption rather than a precise individual determination as a means for predicting job performance? The Court below suggested that the inability of tests to make accurate assessments might justify applying a general presumption. 376 F. Supp. 755-56 (D. Mass. 1974). In the instant case both aspects of determining job qualification are capable of precise determination.

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[58] See, for measurement of functional capacity:

J. Dirken, *Functional Age of Industrial Workers* (1972).

Bouruere, "Assessing Biological Age" in *Processes of Aging* (Williams, Tibbits and Donahue eds. 1963) 184-195.

A. Heron and S. Chowan, *Age and Function* (1967).

Each of these studies developed, and applied, a method for testing functional capacity that would be both highly predictive and economically feasible. (Generally, the method used is to test all variables, and then find correlations that will be used to choose more easily testable functions.)

[59] See for analysis of job requirements: N. Nelson, *Technical Training Guide for Physical Demands Analysis* (1973).

[60] U.S. Dept. of Labor, Manpower Administration, *Handbook for Analyzing Jobs* (1972).

The physical and psychological capabilities necessary to perform competently as a ranking state policeman include physical strength, stamina, alertness and coping with psychological stress.[61] All of the physical qualities are readily testable to a high degree of precision. The psychological capacity may not be subject to as exact a measurement, but this presents neither practical nor legal difficulties.

Stamina, or the capacity to do physical work at a given level for a given period of time, is readily tested by using a bicycle ergometer and attached devices to measure the effect of exertion on biological function (breathing frequency, heart frequency, and vascular resistance).[62] The results of these tests can be compared to the functional requirements established by the state as necessary to the position of a police commander. For the sample group of industrial workers studied, there was no significant diminishment of stamina at age fifty.[63]

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[61] App. Br. at 9, 23.

[62] Dirken, *supra* at 54.

[63] *Id.* at 56. Most measurements show a steady decline from age 30, with only two measurements showing a dramatic decline at any point, that being ages 60-64. At age 55-59, the following % decline from age 30 capacity are indicated:

7% systolic maximum (a measure of vascular resistance)
12% breath frequency
16% heart frequency
23% maximum oxygen uptake
26% maximum exertion capacity

(footnote continued on following page)

The qualities of alertness and strength are similarly determinable to a high degree of precision. Both the testing method, and the results of cross-sectional studies, are readily available. Alertness is essential to airplane pilots, and was a key variable in a study of the relation of age to performance which concluded that individual determinations of fitness for airline pilots over age sixty are possible, accurate and safe.[64] *A fortiori,* it is possible to determine a less precise measure in a less risky situation,

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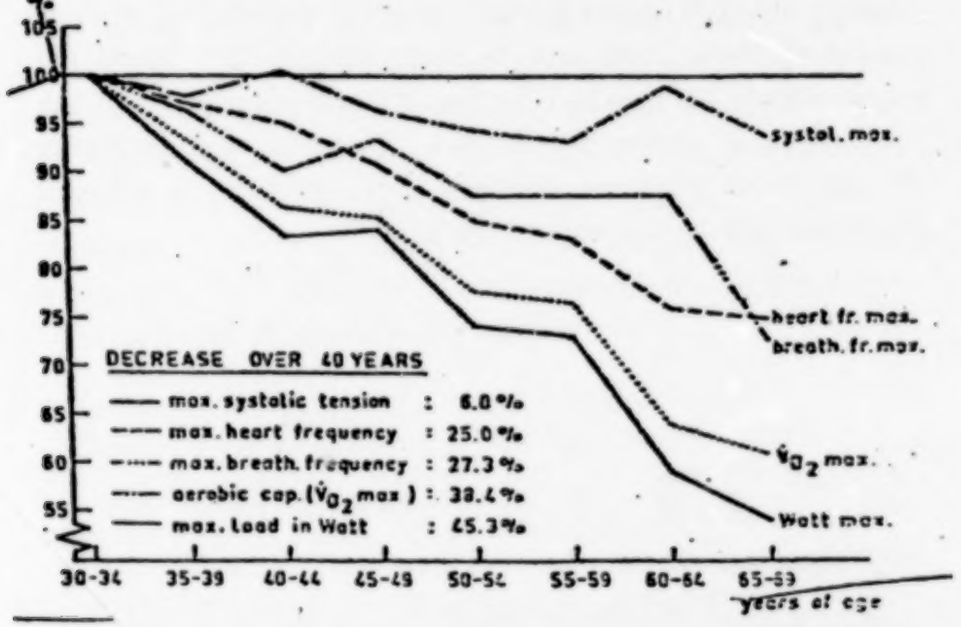
(footnote continued from preceding page)

Fig. 4 Decrease of ergometric variables over 40 years



See also, Robinson, "Experimental Studies of Physical Fitness in Relation to Age," 10 Arbeitsphysiologie 251 (1938), cited in McFarland, "The Need for Functional Age Measurement," Industrial Gerontology 1 (Fall 1973).

[64] McFarland (1973), *supra* at 6-7; see also, McFarland, "Aging and Efficiency in Airmen," *Human Factors in Air Transportation, Occupation, Health and Safety* 369-401 (1953).

as is the case for a state police commanding officer. Physical strength is the most easily measured of all these variables,[65] though its rational relationship to the duties of a commanding officer is not very clear.

The capacity to cope with the stresses of a command position presents a different type of problem.[66] First, there is no evidence to indicate *any* deterioration of intellect or personality around the age of fifty, sixty, seventy, etc.[67] Indeed, in terms of experience, personality development and knowledge, this may be the prime of an individual's decision-making capacity.[68] As a society we act according to this wisdom, entrusting most crucial decision-making positions, with their attendant stress, to men aged fifty, sixty, seventy, etc. (See Appendix A to brief.) Indeed, it is unusual for a person of less than that late "middle-age" to have the full burden of responsibility in any organization operating on a nationwide, or even a state-wide, scale.

Even if there were a decline in an individual's capacity to deal with this type of psychological stress, there is no reason to believe that standard psychological tests would lose validity at the age of fifty, or that the significant

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[65] A. Damon, H. Stoudt, and R. McFarland, *The Human Body and Equipment Design* (1966), cited in McFarland (1973), *supra* at 6.

[66] See, in general, A. Welford and J. Birren (eds.), *Decision Making and Aging, Interdisciplinary Topics in Gerontology, v. 4* (1969).

[67] N. 40, *supra.*

[68] Welford, "Age and Skill: Motor, Intellectual and Social," in Welford and Birren, *supra* at 18.

degree of change would fall below the measuring capacity of those tests. These measures taken to protect the individual and the public from the harmful effects of psychological stress upon a forty year old commanding officer should be entirely adequate to deal with a fifty, sixty, seventy, or eighty year old officer. The common practice of the overwhelming majority of organizations in this country is to promote individuals in their fifties to positions of greater responsibility with full awareness of increased psychological stress. If, contrary to this, appellant believes fifty is the age when people tend to be less able to handle the stress of a leadership position, or when it is no longer possible to predict accurately an individual's capacity to handle stress, appellant should be required to demonstrate a reasonable basis for this belief.

VI.

CONCLUSION

Emerson wrote: "A man's years should not be counted until he has nothing else to count." In more recent times Simone de Beauvoir has written:

> A man's aging and his decline always take place inside some given society, it is intimately related to the character of that society and to the place that the individual in question occupies within it. S. de Beauvoir, *The Coming of Age* 56 (1973).

If the mark of individual integrity and happiness, and of society's treatment of its members, are to be measured for the older men and women in this nation, the conclusion

must be that ours is a nation sadly at odds with itself. We exalt youth, and demean old age. We commend productivity and creativity, and then cut off those who are still able to produce and to create. We deplore poverty, and condemn the old to its ravages. We mouth respect for the individual, and use pernicious generalizations to victimize the many.

Were this the sum total of the matter, we could all join in shared regret and outrage. But there is more. Mandatory retirement not only offends the generalized notions of equity which we share. It further violates the guarantees of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. It is the mandates of these clauses which invite the attention—and action—of this Court. They compel only one conclusion—mandatory retirement is unconstitutional.

Exclusion by mandatory retirement has no rational basis, infringes basic rights and applies generalizations to exclude without particular proof. This Court has seen fit to strike down discriminations on the basis of race, social poverty, travel, religion and family. Mandatory retirement with these profound constitutional infirmities is justified only by an abstract unsupported claim of statistical inference, which this brief has effectively rebutted. The time has come for this Court to discard yet another invidious distinction unjustly applied to many American who need the protection of their Constitution and its Bill of Rights.

For the foregoing reasons, *amici* American Civil Liberties Union, National Council of Senior Citizens, Inc., Legal Services for the Elderly Poor, and Massachusetts Civil

Liberties Union Foundation respectfully urge this Court to affirm the judgment below.

Dated: September 3, 1975

Respectfully submitted,

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On brief:

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APPENDIX

APPENDIX A

Accomplishments Past the Age of 69 (1975)

I. Architecture

Walter Gropius 1883-1969	Active member of The Architects Collective until death at 86; U.S. Embassy in Athens at 77.
Louis Kahn 1901-1974	Yale Mellon Center for British Studies at 71.
LeCorbusier (Charles-Edouard Jeanneret) 1887-1965	La Tourette Monastery at 73; Chandigark, India at 75.
Mies van der Rohe 1886-1969	Seagram Building at 70; National Gallery, Berlin 76-82.
Frank Lloyd Wright 1869-1969	Baghdad Opera at 88; Guggenheim Museum completed at 90.

II. Art

Giovanni Lorenzo Bernini 1598-1680	Ponte Sant'Angela; Tomb of Alexander VII; one of the designers of St. Peters; Altieri Chapel with death of the Blessed Ludovicia Albertoni.
Marc Chagall 1887-	Painter active into 80's.
Salvador Dali 1904-	Surrealist still active at 71.
Marcel Duchamp 1887-1968	Painter active until death at 81.
Max Ernst 1891-	Painter active into 80's.
Vasili Kandinski 1866-1944	Russian post-impressionist painter who founded new abstract school with Paul Klee; active until his death at age 78.
Michelangelo 1475-1564	Greatest works up to time of death at 89.

Joan Miro 1893-	Painter, sculptor, still active at 78.
Grandma Moses (Anna Moses) 1860-1961	Began to paint at 72.
Pablo Picasso 1881-1973	Still active past 90.
David Siquieros 1896-1974	Mexican muralist active until death at 78; "March of Humanity" (50,000 sq. ft. mural) executed in 70's.
Edward Steichen 1879-1973	Photographer, Director Emeritus of Department of Photography, Museum of Modern Art; edited *The Family of Man* at 76; one man exhibit at MOMA at 82.
Tintoretto (Jacopo Robusti) 1518-1594	Worked until death at 81.
Titian 1477-1576	Portraits of Pope Paul III; completed Pieta immediately before death at 99.

III. Business and Labor

Bernard Baruch 1870-1965	73 when wrote report on post-war conversion of American economy; appointed to U.N. Atomic Energy Committee at 76.
Harry Bridges 1900-	Labor leader, still active at age 75.
Cyrus Stephen Eaton 1883-	Published: Is the Globe Big Enough for Capitalism and Communism? at 75; Canada's Choice at 76; The Engineer As Philosopher at 78; holds nine directorships; Trustee, Denison University; University of Chicago.
Alfred Fuller 1885-1973	Chairman of Board of Fuller Brush Co. at 83.
Cary Grant 1904-	Head of Faberge Perfumes at 71.
John L. Lewis 1880-1969	President of United Mine Workers of America from age 40 to 80.

George Meany 1894-	President of AFL-CIO at 81.
Bill Rickets	Present Chairman of Chappel's, the international music firm, age 90.
Col. Sanders (fried chicken)	Started at 66; now 82.

IV. Cinema

Luis Buñuel 1900-	Director, still active at 75; directed Tristana at 70; The Petit Charm of the Bourgeoise at 72; The Phantom of Liberty at 74.
Charlie Chaplin 1889-	Published My Autobiography at 75; wrote and directed "A Countess From Hong Kong" at 78.
Vittorio de Sica 1902-1974	Directed *Garden of Finzi-Continis* at 70; *Brief Vacation* at 71.
Alfred Hitchcock 1899-	Motion pictures and television producer; still active at 76; *Frenzy* at 73.
Jean Renoir 1894-	Directed C'est La Revolution at 73; La Petit Theâtre de Jean Renoir at 77.

V. Education

William Benton 1900-1973	Publisher of 15th Edition of Encyclopedia Britannica at 73.
James Bryant Conant 1893-	Thomas Jefferson and the Development of American Public Education at 69; The Education of American Teachers at 70; Two Modes of Thought at 71; Shaping Educational Policy at 71; The Comprehensive High School at 74; My Several Lives—Memoirs of a Social Inventor at 72.
Sir Alan Gilbert	Continues to teach (Drew University) at 82; since retirement at 69, has written, translated or edited six books and published 17 scholarly articles.
Noah Webster 1758-1843	Published American Dictionary of English Language at 70; published a revision of the Authorized Version of the English Bible at 75.

René Wellek 1903-	Working on 5th volume of History of Modern Criticism at 72.

VI. Fiction and Poetry

Melville Cane 1879-	At 92, a practicing lawyer; commissioned to write commemorative poem for Phi Beta Kappa's bicentennial in 1976; author of Make a Poem at 74; And Pastures New at 77; Bullet-Hunting at 81; To Build A Fire at 85; So that It Flower at 87; All and Sundry, autobiography published at 89; co-editor The Man From Main Street, at 74; The Golden Year at 81.
Agatha Christie 1890-	Mystery writer, active at age 85, 14 novels after age 69.
Jean Cocteau 1891-1963	Writer, poet.
Noel Coward 1899-1973	Playwright.
T. S. Eliot 1888-1965	On Poetry and Poets at 69; The Elder Statesman at 70; Collected Poems (1909-62) published at 75.
Robert Frost 1874-1963	From age 69-75, Ticknor Fellow in Humanities at Dartmouth; Ambassador of Good Will to South America at 80, Israel and Greece at 87, Russia at 88; Congressional Gold Medal at 88; represented the Arts at John F. Kennedy's inauguration at 87; wrote a Masque of Reason at 71; Steeple Bush at 73; A Masque of Mercy at 73; In the Clearing at 87.
Johann Wolfgang von Goethe 1749-1832	Second part of Faust completed at 82.
Pär Lagerkvist 1891-1974	Pilgrim at Sea at 71; Marianne at 78.
Melchior Lengyel	Playwright, still active at age 92.
Marianne Moore 1887-1972	Poet, active until death at age 85.

Vladimir Nabokov 1899-	Novelist still active at 76; *Ada* at 70; *Glory* at 72.
Ezra Pound 1885-1972	Latest installment of the Cantos at 74; Sophoclean Translation, The Woman of Trachis at 71; Translation of the Classic Anthology Defined by Confucius at 69.
George Ryaal (Audax Minor)	Writes a weekly column on horse racing for the New Yorker at age 80.
Rex Stout 1886-	Writer of mystery novels, 91.
Mark Twain (Samuel Clemens) 1835-1910	Active until death at 75; What is Man?, Eve's Diary at 71.
Thornton Wilder 1897-	Novelist & Playwright; The Eighth Day at 70; Theosophilus North at 76.
Walt Whitman 1819-1892	Good-bye, My Fancy at 70.
P. G. Wodehouse	Author of 23 novels after age 69.

VII. Government and Heads of State

Konrad Adenauer 1876-1967	Chancellor of West Germany, 73-87.
King Gustaf VI Adolf 1882-1973	Ruler of Sweden until 91.
David Ben-Gurion 1886-1973	Prime Minister and Minister of Defense from Israel's formation at 62 to 77; Member of Knesset from 77 to 79.
Sir Alexander Bustamante 1884-	Prime Minister at 78; active politically at 91.
Winston Churchill 1874-1965	Leader of wartime government at 71.
Georges Clemenceau 1841-1929	Prime Minister of France during World War I at 76.
Chiang Kai-Chek 1887-1975	Head of Nationalist Chinese Government on Formosa until 88.
Chou En Lai 1898-	Premier of China at 77.

Charles De Gaulle 1890-1970	President of France for over 20 years until age 79.
Sam Ervin 1896-	Chaired Senate Watergate Committee at 76.
Francisco Franco 1892-	Spanish head of state at 83.
Benjamin Franklin 1706-1790	Delegate to Second Continental Congress in 69th year; one of five drafters of Declaration of Independence at 70; afterwards Ambassador to France until 79; attended Constitutional Convention of 1787 at 81.
Gandhi 1869-1948	Arrested at age 73 as leader of Indian Independence Movement; active till death at 79.
Malana Hamid	Bangladesh opposition leader at age 90.
Paul Hoffmann 1891-1974	U.N. administrator; managing director of U.N. Special Fund till 75; of U.N. Development Program till 83.
Ismet Inonu 1884-1973	Re-elected prime minister of Turkey at 77, served to 81; leader of opposition party until 88.
Jomo Kenyatta 1893-	President of Kenya from age 70, now 82.
Jawaharlal Nehru 1889-1964	Prime minister of India until death at 75.
Pope Paul VI 1897-	Elected at 66, now 78.
Sarvepalli Radhakrishnan 1885-1975	President of India until 79.
Samuel Rayburn 1882-1961	Speaker of the House at 78.
Eisaku Sato 1901-	Prime Minister of Japan at 70; President of Liberal Democratic Party at 73.
Emperor Haile Selassie 1891-1975	Ruler of Ethiopia until deposed at 83.

Marshall Jossip Broz Tito 1892-	President of Yugoslavia at 83.
Mao Tse-Tung 1893-	Chairman People's Republic of China at 82.
Eamon de Valera 1882-1975	President of Ireland until age 91.
Walter Ulbricht 1893-1973	Chairman of DDR Communist Party until 78.

VIII. Presidents of the United States

James Buchanan 1791-1868	Inaugurated at 65; 69 at end of term.
Dwight Eisenhower 1890-1969	Inaugurated at 62; 70 at end of term.
Andrew Jackson 1767-1847	Inaugurated at 61; 70 at end of term.
Harry S. Truman 1884-1973	33rd President; 69 at end of term; active until 89.

IX. Historians and Political Theorists

W.E.B. DuBois 1868-1963	Professor at Atlanta University until 76; Founder of Phylon magazine at 72; politically active until death at 95; *Dusk at Dawn* at 72.
Will Durant 1885-	The Story of Civilization: Vol. VI, The Reformation at 72; Vol. VII, The Age of Reason Begins (with Ariel Durant) at 76; Vol. VIII, The Age of Louis XIV (with A. Durant) at 78; Vol. IX, The Age of Voltaire (with A. Durant) at 80; Vol. X, Rousseau and Revolution (with A. Durant) at 82; The Lessons of History (with A. Durant) at 83; Interpretations of Life (with A. Durant) at 85; History of the Revolutionary Years 1640-1660.
Thomas Hobbes 1588-1679	Continued writing and publishing until death at 91.
Alexander Kerensky 1881-1970	Provisional Government of 1917 In Documents—3 volumes at 80; Russia and History's Turning Point at 84.

Samuel Eliot Morison 1887-	Eminent American historian; 14 books after age 69, including Pulitzer Prize; *The European Discovery of America: The Southern Voyages* at 87.

X. Journalists

Arthur Krock 1886-1974	Journalist, retired from Times Washington Bureau at 80; 4th Pulitzer at age 89.
Walter Lippmann 1889-1974	Pulitzer prizes at 69 and 73; Overseas Press Club Award; active daily columnist until age 78, and occasional contributor to Newsweek until 82.

XI. Law

A. *Judges*

Tanaka Kotaro 1890-1974	Chief Judge, Japanese Supreme Court to age 70; served on International Court of Justice in The Hague, ages 71-79.

Chief Justices of Supreme Court

Melville Fuller 1888-1910	Age at installation, 65; age at end of term, 77.
Charles E. Hughes 1862-1948	Age at installation, 63; age at end of term, 79.
John Marshall 1755-1835	Age at installation, 46; age at end of term, 80.
Harlan Stone 1872-1946	Age at installation, 69; age at end of term, 74.
William H. Taft 1857-1930	Age at installation, 64; age at end of term, 73.
Roger Taney 1777-1864	Age at installation, 59; age at end of term, 87.
Morrison Waite 1816-1888	Age at installation, 58; age at end of term, 72.
Earl Warren 1891-1974	Age at installation, 62; age at end of term, 78.
Edward White 1845-1921	Age at installation, 65; age at end of term, 76.

Present Supreme Court

William O. Douglas 1898-	Age at installation, 41; now age 77.

Judges

Hugo Black 1886-1971	Age at installation, 51; age at end of term, 85.
Louis Dembitz Brandeis 1856-1941	Age at installation, 60; age at end of term, 83.
Learned Hand	On the bench until 79.
John Marshall Harlan 1899-1971	Age at installation, 41; age at end of term, 71.
Oliver Wendell Holmes 1841-1935	Age at installation, 61; age at end of term, 91.
Judge Harold Medina 1888-	Senior Judge in the Second Circuit at 83.

As of 1975, 47 Senior Circuit Court Judges and 102 Senior District Court Judges active in Federal Judiciary.

B. *Lawyers*

Herman Arthur Fischer	Chairman of the Board, Gary-Wheaton Bank from age 70 to age 84; active in law practice at age 90.
Sam Markewich 1882-	Practicing lawyer at the age of 87.

C. *Professors*

Paul E. Basye (Hastings) 1901-	At 69, 2nd edition Clearing Land Titles.
William Wirt Blume (Hastings) 1893-	At 70, aid in preparation of Michigan Civil Procedure; two extensive articles, Hastings Law Journal at 73 and 77.
Jerome Hall (Hastings) 1901-	"Archives for Philosophy of Law and Social Philosophy" at 69; "Legal Thought in the U. S. A. under Contemporary Pressures"; "Justice in the 20th Century", soon to be published; "Jurisprudential Theories and the

	Effectiveness of the Law", to be published in *Nomos;* will present paper to American Society for Political and Legal Philosophy at annual meeting.
Frederick Kessler 1901-	Educator and law professor.
Norman D. Lattin (Hastings) 1894-	Recently, new edition of text on *Corporations.*
Frederick J. Moreau (Hastings) 1893-	*After Age 70:* Two large supplements to two-volume work which appeared initially in 1957; two surveys of California Law, 140 pages total; just agreed to do 3rd supplement to above.
George E. Osborne (Hastings) 1893-	2nd edition of text on *Mortgages* at 77; *Cases on Suretyship* at 73; *Cases on Secured Transactions* at 74.
Rollin M. Perkins (Hastings) 1889-	Cases on Criminal Law and Procedure (3rd ed.) at 77; Perkins on Criminal Law (2nd ed.) at 80; "The Vagrancy Concept", 9 Hast. L. J. 237 at 69; "Collateral Estoppel in Criminal Cases", at 71, at U. of Ill. L. J. 533; "Analysis of Assault and Attempts to Assault", 47 Minn. L. R. 71 at 73; "Corpus Delecti of Murder," 48 Va. L. R. 173 at 73; "Alignment of Sanction with Culpable Conduct", 49 Ia. L. R. 325 at 75; "Some Weak Points in the Model Penal Code", 17 Hast. L. J. 3 at 76; *Book Reviews:* Glueck: Roscoe Pound and Criminal Justice, 11 N. Y. Law Forum 725 at 77; Packer: Limits of the Criminal Sanction, 15 N. Y. Forum 442 at 79.
Roscoe Pound	Professor at Harvard Law School from 66 to 77; after age 77, active in numerous legal, editorial and educational positions, including a reorganization of the Nationalist Chinese Judicial System.

Richard R. Powell (Hastings) 1890-	*Books:* Abridgement of Treatise on Real Property (with P. J. Rohan) at 78; Wills and Trusts (preliminary edition of Columbia and Michigan—3 installments—1959, at 69; Truncated Readings in the Law of Future Interests for California, 1 vol., 1962, at 72; *Articles:* "Perpetuities in Arizona", Ariz. L. R. 225 (1959) at 69; "Perpetuities", Encyclopedia Britannica (1959) at 69; "Relation Between Property Rights and Civil Rights", 15 Hast. L. J. 135; "Race and Property", Diablo Press, 1964 at 71; "New Powers of Appointment Act", 103 Tr. & Est. 807 (1964) at 74; "Rac. Dis. in Housing in Cal.", 18 Va. L. R. W. (1965) at 75; "Alaskan Earthquake of 1964", 18 Hast. L. J. 365 (1967); "Freedom of Alienation—For Whom", 2 Real Orio, Oribate & Trust J., 127 (1967) at 77; "Powers of Appointment in Cal.", 19 Hast. L. J. 1281 (1968) at 78; "Elliot E. Cheatham—Gentleman", 22 Vand. L. J. 16 at 78; "Law and Its Impact on the Family (for Law wives of Hastings) at 78; "The Growth of the Law" (ed.), at 80; "How Free Is It Socially Desirable . . . ", Record, Assn. of Bar, City of New York at 81.
	In addition: 24 addresses given since 1960 (since age 70); *Book Reviews:* Scott Abr. 46 Corn. L. Q. 375 at 71; Dietz, In Defense of Property, 17 Stan. L. R. 779 at 75; Anderson, Amer. Law of Zoning (4 vols.), 20 Hast. L. J. 1163 at 79; *Three studies* made for New York Law Revision Commission at 72, at pp. 487-99, 515-20, 603-04; *Study* for Cal. Law Revision Commission at 77; "Powers of Appointment, With Proposed Draft Statute."
William L. Prosser (Hastings) 1898-1974	*After age 70:* 3rd edition of text on *Torts;* Reporter of new *Torts Restatement.*

Lewis M. Simes (Hastings) 1889-	Improvement of Conveyancing by Legislation at 71 (with C. E. Taylor); Model Title Standards at 71 (with C. E. Taylor); Handbook for More Efficient Conveyancing at 72; 2nd ed. Handbook of Future Interests at 77; "Perpetuities in California Since 1951" (Hast. L. J. 1967) at 78.
Roscoe T. Steffen (Hastings) 1893-	"The Private Placement Exemption", 30 U. Chi. L. R. 211 at 70; Cases on Commercial and Invesement Paper, 3rd ed. at 71; "Enterprise Liability: Some Exploratory Comments", 17 Hast. L. J. 165 at 72; "Private Placements Should Be Registered", 43 N. C. L. R. 548 at 72; Cases on Agency-Partnership, 3rd ed., at 76.
Clarence M. Updegraf	At 73, Article, 17 Hast. L. J. 473; at 77, 3rd ed. of Arbitration and Labor Relations; published, at 78, book review of Labor Relations Between Public Employees and Employers (Sullivan).
Harold E. Verbal (Hastings) 1902-	At 69, new edition of book on Community Property.

XII. Music and Dance

George Balanchine 1904-	Director and chief choreographer of New York City Ballet at 71.
Karl Boehm 1894-	Conductor, still active at 81.
Nadia Boulanger 1887-	Still active teaching musical composition at 88.
Pablo Cassals 1876-1973	Active past the age of 90.
Rudolf Friml 1879-	Active as composer and pianist past 90.
Martha Graham 1894-	Active as choreographer at 81; active as dancer until 78.
Franz Joseph Haydn 1732-1809	Composer, active until his death at age 77.

Otto Klemperer 1885-1973	Active as conductor until age 87.
Joseph Krips 1896-1974	Conductor, active at age 76.
Jean Philippe Ramean 1683-1764	Last great operas from age 74-77.
Artur Rubenstein 1889-	Pianist still active at 86.
Charles Camile Saint-Saens 1835-1921	Wrote a number of operas from age 69-76; a series of works for wind instruments and piano from 80 to 86.
Leopold Stokowski	Conductor of the American Symphony Orchestra at age 90.
Robert Stoltz	Composer, active at age 91.
Igor Stravinsky 1882-1971	Composer, active until his death at age 88.
Georg Phillipp Telemann 1681-1767	Finest musical works when over 80.
Arturo Toscanini 1867-1957	Conducted until age 87.
Giuseppe Verdi 1813-1901	Opera composer, completed Otello at 72, Falstaff at age 80.

XIII. Philosophy

Henri Bergson 1859-1941	Deux Sources de la Morale et da la Religion at 71; La Pensee et le Mouvant at 73.
Brand Blanchard 1892-	Educator and Philosopher; at 70 visiting prof. at U. of Minn. and pub. Reason & Analysis.
Franz Brentano 1838-1917	Aristoteles Lehre vom Ursprung at 73; Kategorienlehre from 73-76; Versuch uber die Erkenntnis until death.
Ernst Cassirer 1874-1948	"Essay on Man" at 70; Myth of the State at 71 (died at 71).

John Dewey 1859-1952	Common Faith at 75; Logic, The Theory of Inquiry at 79.
Charles Hartshorne 1897-	Educator and Philosopher.
Martin Heidegger 1889-	Unterweis zur Sprache at 70; Nietzsche at 72; Die Frage Nach Dem Ding at 73; Kants These Uber das Sein at 74; Die Technik und die Kehre at 74.
William E. Hocking 1873-1966	Meaning of Immortality in Human Experience at 84.
Immanuel Kant 1724-1804	Religion within the Limits of Reason Alone at 69; Eternal Peace at 71; from 71-80, six works at 816 total pages.
Horace Meyer Kallen 1882-	Educator and Philosopher. Distinguished Seminar Professor at Long Island University from age 82 to 86; *Published:* Secularism is the Will of God, at 72; Cultural Pluralism and the American Idea, at 74; Utopians at Bay, 76; The Book of Job as Greek Tragedy, at 77; A Study of Liberty, at 77; Philosophical Issues in Adult Education, at 80; Freedom, Tragedy, and Comedy, at 81; Laughter and Tears, at 86.
C. I. Lewis 1883-1964	The Ground and Nature of the Right at 71; Our Social Inheritance at 72; working on manuscript at time of death at 81.
Jacques Maritain 1882-1973	Professor of Philosophy at Princeton from 66 to 73; Man and the State at 69; Creative Intuition in Art and Poetry at 71; La Philosophie Morale: examen historique et critique des grand systemes at 78; English Translation—The Person and the Common Good at 84.
Stephen C. Pepper 1891-	Concept and Quality at 76.

Ralph Barton Perry 1876-1957	Realms of Value at 78.
Thomas Reid 1710-1796	Essays on the Active Powers of Man at 78; Essays on the Intellectual Power of Man at 75.
Bertrand Russell 1872-1970	Nobel Prize for Literature, 1950 at 78.
George Santayana 1863-1952	Realms of Being at 77; Persons and Places at 80; Last Puritan at 72.
Ashbel Smith	Professor of Philosophy at the University of Texas for the past six years and continues in this capacity at the age of 73; published A Natural Theology for Our Time at 70; also has authored numerous articles in professional journals after passing the age of 70.
Herbert Spencer 1820-1903	Synthetic Philosophy (10 vols.) finished at 76.
James Ward 1843-1925	Essays in Philosophy at 82.
Paul Weiss 1901-	Educator and Philosopher; Philosophy in Process 6 Volumes (1968-75); Making of Men, 68; Cinematics, 73; Beyond All Appearances, 72; Sports: A Philosophical Inquiry, 71; Hofstra Distinguished Scholar Medal, 72; Fellow Ezra Stiles College; Heffer Prof. Philosophy Catholic U. of America, 1969-

XIV. Psychology

Sigmund Freud 1856-1939	Das Unbehagen an der Kultur at 74; New Series of Vorlesungen zur Einfuhrung in die Psychoanalyse at 76; Moses, Sein Volk und die Monotheistische Religion at 82.
Carl Jung 1875-1961	Appointed Professor of Medical Psychology at University of Basel at 68.

XV. Religion

Augustine 354-430	The City of God, between 59-72.
Martin Buber 1878-1965	Paths in Utopia at 69; Between Man and Man at 69; Hasidism and the Way of Man at 70; Two Types of Faith at 73; Images of Good and Evil at 74; Elija: ein myster enspiel at 85.
Paul Tillich 1886-	Professor at Harvard Univ. from 69-76; Professor at Univ. of Chicago from 76 to death at 79; 3 vols. Systematic Theology, age 65-77; The New Being at 69; The Eternal Now at 77.

XVI. Sports

George Halas 1895-	Coach of Chicago Bears until 72; President of NFC at 75; still active as Chicago Bears' Chairman of the Board at 80.
Adolph Rupp 1901-	Coach of U. of Ky. basketball until age 71; retired to become President of ABA Memphis Tams.
Casey Stengel 1889-	World championship and Manager of Year at 69; pennant winner at 71; charismatic leader of Mets until 76.